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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

B204751

Plaintiff and Respondent,

(Los Angeles County Super. Ct. No. 7SR03358)

v.

DAVID INSELMAN,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County.

Martin R. Gladstein, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)

Dismissed.

Michael P. Judge, Public Defender, and Lawrence Miller and John Hamilton Scott, Deputy Public Defenders, for Defendant and Appellant.

Rockard J. Delgadillo, Los Angeles City Attorney, Debbie Lew, Assistant City Attorney, and Eric Cioffi, Deputy City Attorney, for Plaintiff and Respondent.

David Inselman appeals from a pretrial, criminal protective order issued pursuant to Penal Code section¹ 136.2. The two main issues raised by this appeal are (1) whether such an order should be reviewable as an appealable injunction or by a writ petition, and (2) whether the order issued complied with due process. We dismiss the appeal as the protective order is no longer in effect.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Factual Background²

Appellant was charged with the following misdemeanors: battery, vandalism and making criminal threats. The offenses stemmed from an altercation between appellant and the victim Robert Alcaraz.

Appellant was a local transient, who had been residing in the detached garage of a home owned by Teresa Botana for one year. Appellant did "odd jobs around the house to pay for his rent." The victim, Botana's son, resided with her. Botana was 87 years old, and Alcaraz was 71.

On May 28, 2007, appellant and Alcaraz engaged in a dispute over money (i.e., \$65). Appellant "pushed [Alcaraz], who fell backwards landing between a tree and a block wall." Alcaraz "then went into his residence stating he was calling the police." Appellant "went to the window of [Alcaraz's] bedroom," stating that if the victim did so he would kill Alcaraz and his mother "and then 'blow up' the residence." Appellant "hit his hand against the window and broke it."

Unless otherwise noted, all statutory references are to the Penal Code.

The facts are based on statements made to police officers as reflected in a police report.

During the police investigation of the altercation, appellant "made spontaneous statements" to officers that he pushed the victim and broke the window. The police report indicates appellant was involved in an unrelated fight with another individual prior to May 28 and listed as suspected of a battery.

II. Procedural Background

A. The Protective Order

On June 18, 2007, the case was called before the Honorable Martin Gladstein, Commissioner. Appellant was present and represented by Deputy Public Defender Lawrence Miller. After appellant entered a not guilty plea, the court indicated it would issue an emergency protective order pursuant to section 136.2. Before the order was issued, appellant's counsel objected, arguing that no notice had been given nor was there an opportunity to be heard on the matter. Counsel proferred that appellant had been the caretaker of Botana and her husband for 15 to 20 years, and if a protective order issued compelling appellant to leave the detached garage, there would be "nobody to take care of them."

The People responded the police report indicated that appellant had threatened to kill Alcaraz and Botana if Alcaraz called the police and that appellant stated he would "blow up the residence." Appellant countered stating he denied threatening the victim and proffered the victim "is an alcoholic," "has \$60,000 worth of outstanding warrants," and "made it [the allegations] up." The following exchange then took place:

The Court: Well, for purposes of the request for a protective order as well as things like setting bail, it is assumed that allegations are true.

Mr. Miller: I disagree that you have to assume that it is true for the purposes of the issuance of a protective order.

The Court: Well, I can look at the report if you want me to.

Mr. Miller: Please. It is a rather short report. I can print up an opposition and would ask the court to read my moving papers. The people have given no notice, which is required under the law.

The Court: I disagree with you.

Mr. Miller: The case law says it is required.

The Court: Submitted?

Mr. Miller: No. I'd like to file an opposition. I'd like you to read the moving papers.

The Court: Then file them.

Mr. Miller: I'll have to have a few minutes to do so.

The court heard unrelated matters while appellant prepared and filed his opposition. The People filed a written response. After a recess, appellant was heard regarding his opposition. Appellant agreed a hearing was not required by section 136.2, but argued it was unconstitutional on its face because it violated due process. The People responded by referencing the threats described in the police report. Despite asking the court to consider the police report, appellant stated, "But what evidence does the court have before it that the statement was ever made and that -- there is no competent evidence. It is hearsay at this time." Appellant, who made no additional offers of proof and presented no affidavits or declarations, stated he owned "[n]o guns." The court ruled: "All right. Your objection to the issuance of the order is noted insofar as it substitutes for a motion for a full hearing, which is denied."

The court signed the instant protective order. Both the box for "order pending trial" and the box for "order post-trial probation condition" were checked as was the box for female rather than male. The order provided, "This order expires on . . . 6-18-10." The judicial officer was misidentified as Brand Gladstein vice Martin Gladstein.

The court set a trial date for July 23. The matter was continued several times by the People. On November 16, the People objected to any further continuances, noting that "dragging out the trial is delaying justice for all parties." Appellant's counsel stated his request for a continuance was warranted because he "recently [came in] to handle this

case," and needed time to investigate it. The court denied appellant's request to stay the protective order and set the matter for trial on December 6.

Appellant failed to appear on December 6, and the court issued a bench warrant. The court released the warrant on December 20. On December 31, the court called the case for a hearing. Appellant appeared and pled no contest to count I, the battery charge. The court accepted the plea, finding a factual basis existed in the police report to support the plea. The court dismissed the remaining counts. The court suspended imposition of the sentence and placed appellant on summary probation. As a condition of probation, the court issued a protective order. Due to clerical error, the post-conviction order was issued pursuant to section 136.2. On January 4, 2008, the court corrected the error nunc pro tunc and reissued the protective order under section 1203.1. The court's minute order stated the post-conviction protective order superseded the pretrial protective order.

B. Writ Petitions

On July 17, 2007, appellant filed a petition for a writ of prohibition in the Appellate Division of the Superior Court of Los Angeles County (Appellate Division). The Appellate Division denied the petition. On August 16, appellant filed a petition for a writ of mandate in this court (the Court of Appeal). This court denied the petition, stating, "[t]he petition is denied, as petitioner has not exhausted his remedy at law by petitioning for writ of supersedeas ancillary to his pending appeal in the Superior Court Appellate Division." Appellant then filed a petition for a writ of supersedeas in the Appellate Division, arguing a stay of the protective order was warranted because the order was akin to a civil injunction and such an injunction is automatically stayed by an appeal. The Appellate Division denied the petition.

If an injunction is prohibitive in nature, its operation is not automatically stayed under Code of Civil Procedure section 916 by the appeal from the order granting it. (*Sun-Maid Raisin Growers v. Paul* (1964) 229 Cal.App.2d 368, 374.)

On September 17, appellant once again petitioned this court for a writ of mandate asking this court to direct the Appellant Division to vacate its denial of appellant's petition for a writ of prohibition and to enter an order forever restraining enforcement of the injunctive order (i.e., the section 136.2 order). On October 16, this court ordered the People to show cause as to why the Appellate Division should not be compelled to vacate its order denying the petition for a writ of supersedeas and enter a different order granting the petition.

C. The Appeal

Also on July 17, appellant appealed the issuance of the protective order. The notice of appeal was not directed to any particular court. The appeal was sent to the Appellate Division.

On December 7, appellant filed a writ petition in this court seeking an immediate stay of the appeal pending in the Appellate Division. The petition sought transfer of the appeal to this court. This court issued a *Palma* notice (*Palma v. U.S. Industrial Fastners, Inc.* (1984) 36 Cal.3d 171) indicating it was inclined to order the transfer of the appeal from the Appellate Division. Two days later, the Appellate Division ordered the appeal transferred to this court. On January 10, 2008, this court dismissed the petition for a writ of mandate as the appeal had been transferred to this court.

DISCUSSION

Appellant contends the instant order was issued in violation of his right to due process and is not supported by competent evidence. However, those issues are moot as to appellant because the court entered an order under section 1203.1 superseding the instant order when appellant entered his plea. Accordingly, we dismiss this appeal.

DISPOSITION

The appeal is dismissed as the protective order is no longer in effect.

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	WOODS, J.
We concur:	
PERLUSS, P.J.	
JACKSON, J.	